SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1970

No. 1055

TRAVIS GRANT ASHBROOK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOWARD E. BECKLER
6922 Hollywood Blvd.
Suite 301
Hollywood, Calif. 90028
(213) 465-1191 465-7131

Counsel for Petitioner

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HOWARD E. BECKLER
6922 Hollywood Blvd.
Suite 201
Hollywood, Calif. 90028
(213) 465-1191 465-7131

Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

Petitioner, Travis Grant Ashbrook, hereby applies for writ of certiorari directed to the United States Court of Appeals for the Ninth

Circuit to review the judgment rendered by said court in the above entitled cause. The opinion of the Court of Appeals herein is appended hereto and designated as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals in the instant matter was entered October 14, 1970. A petition for rehearing was thereafter filed by petitioner, and the same was denied by the order of the Court of Appeals filed November 5, 1970. A copy of said order is appended hereto and designated as Appendix "B" to this petition. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

NATURE OF PROCEEDINGS

The instant case concerns the subject of marijuana importation and transportation and the effect on the penal statute governing the same had by the decisions of this Court in four matters. The statute involved in the case at bar is Title 21, United States Code, Section 176(a). The pertinent decisions of this Court respecting the issue are: Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d

889 (1968); Grosso v. United States, 390 U.S. 62, 88 S. Ct. 709, 19 L. Ed. 2d 906 (1968); Haynes v. United States, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968); and Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969).

QUESTION PRESENTED

The question raised by the present proceedings is whether compliance with applicable federal law respecting marijuana importation by a person bringing marijuana into the United States, to avoid violation of 21 U.S.C. 176(a), exposes that person to a real and appreciable risk of self-incrimination under state laws proscribing the possession of marijuana, and whether, if so, such compliance can be mandated and non-compliance punished consonant with the Fifth Amendment privilege against self-incrimination as expressed and applied in the Marchetti, Grosso, Haynes, and Leary cases, supra.

STATEMENT OF FACTS

The present matter was tried to the court without a jury on a stipulated statement of facts which is set forth below:

On March 19, 1969, a shipment containing two surfboards, a sewing machine and a scale, arrived via Swissair from Karachi, West Pakistan to United Airlines, Los Angeles International Airport. The shipment was shipped by and consigned to appellant, TRAVIS ASHBROOK.

On March 19, 1969, a search of the surfboards by Custom Inspector Donald Mantlo and Customs Agent George Corley revealed that the surfboards contained 43 pounds of hashish.

On March 20, 1969, at approximately 9:00 A.M., appellant arrived at the United States Customs Office, United Airlines, Los Angeles International Airport. The appellant asked United Air Freight Agent D. O. Buchner about a shipment of personal belongings for Travis Ashbrook.

Agent Buchner gave the contents of the shipment described in the first paragraph above to appellant. Appellant then stated to Agent Buchner that he had carried the personal belongings described in the first paragraph above across the airport in Pakistan in order to ship them air freight rather than as excess baggage on a commercial airline.

On March 20, 1969, at approximately 9:30 A.M., Agent Buchner assisted appellant in carrying the two surfboards to a tan 1964 Chevrolet Corvair bearing California license KIY 534 and further assisted appellant in placing the two surfboards in the carriers on the vehicle.

Appellant then departed the U.S. Customs area of the United Airlines Cargo Section, Los Angeles International Airport, in the 1964 Chevrolet Corvair. He travelled to the Lake Hemet Market located at 56571 State Highway 74, Riverside County, California, arriving at approximately 12:30 P.M., March 20, 1969.

Appellant and two other individuals, John Moore Robinson IV and Mark Stanton, then removed the two surfboards from the roof of the Chevrolet and placed them in the bed of a GMC pickup truck. The truck then departed followed by appellant in the Chevrolet for approximately ten minutes, at which time, at the junction of Forrest Service Road 6505 with Highway 74, appellant got out of the Chevrolet and entered the bed of the truck. The truck then proceeded west on 6505.

At approximately 1:30 P.M., March 20, 1969, at a location approximately 1.8 miles from the intersection of Forrest Service Road 6505 with Highway 74, the truck stopped and appellant was arrested by U.S. Customs Agents. The two surfboards were seized approximately 40 feet from the vehicle.

The two surfboards seized at the time of appellant's arrest contained approximately 39 pounds of concentrated marijuana resin (commonly known as hashish).

No further evidence was introduced by either party at trial.

PETITIONER'S POSITION

Petitioner contends that the statute here involved, 21 U.S.C. 176(a), seeks to punish marijuana importation only where such importation is otherwise contrary to law; that such occurs, in essence, where the marijuana is not declared, invoiced, and registered and where tax payments respecting it have been avoided and not paid; that compliance with the law in the above particulars exposes the importer to substantial self-incrimination risks under pertinent state statutes; and that accordingly, under the Fifth Amendment, such compliance cannot be compelled or its failure penalized.

ARGUMENT

A

Purview of 21 U.S.C. 176(a)

By its express language, Section 176(a) has limited application. It concerns marijuana which is imported or brought into the United States "contrary to law" and "with intent to defraud the United States" or which "should have been invoiced" but which instead was smuggled or clandestinely introduced into the country. The section does not, thus, proscribe all marijuana importation. The importation or introduction of marijuana into the United States,

unlike narcotic drugs under 21 U.S.C. 173, is not, per se, made unlawful by Section 176(a). Rather, such importation becomes unlawful only where the marijuana has not been declared and where requisite registration and tax payment have been fraudulently avoided. Such was recognized and expressed in Ortiz v. United States, 329 F.2d 381 (5th Cir. 1964) where, at page 382, the court succinctly stated:

> " . . . the importation of marijuana is illegal except after payment under 26 U.S.C.A. 4751 of the special tax there required, and after registration under the provisions of 26 U.S.C.A. 4753 . . . ."

Accordingly, it must be concluded that the penal sanctions of Section 176(a) are applicable only to instances of unlawful marijuana importation and that the declaration, invoicing, and registration of, and tax payment on, the merchandise avoids such a consequence.

B

Self-Incrimination

Inherent, however, in the foregoing procedures by which lawful marijuana importation could be accomplished, is the manifest risk of self-incrimination on the part of the importer. This is so because for the importer to comply

with the federal law in this respect, he must necessarily do things (declaration, registration, tax payment) which reveal his possession of the marijuana being brought by him into the country. Such possession is, under the laws of the several states of the union, proscribed conduct (e.g., California Health and Safety Code, Section 11530; see, also, Leary v. United States, supra, at pages 16-17 and footnote 15 of 395 U.S.). Accordingly, compliance with the federal law requires a person to acknowledge and establish facts that subject him to criminal liability and sanctions under pertinent state statutes, which liability and sanctions are both "real and appreciable" under any objective view of the matter.

C

Decisional Approach to Issue

Earlier decisions by federal trial and appellate courts (e.g., Rule v. United States, 362 F.2d 215 (5th Cir. 1966); Pickett v. United States, 223 F. Supp. 695 (C.S.D. Cal. 1963)), have upheld the constitutionality of Section 176(a) as it relates to the importation of marijuana against the contention that the section is violative of the Fifth Amendment protection against self-incrimination. These decisions, however, antedate the Marchetti, Grosso, Haynes, and Leary line of decisions which, it is submitted, have significantly enlargened the scope of Fifth

Amendment protection in the area under consideration.

The earlier cases, such as Rule and Pickett, upholding Section 176(a) against Fifth Amendment attack, did so essentially for two reasons. The first was that the self-incrimination contended by the defendant pertained to a violation of the marijuana transfer tax statute, 26 U.S.C. 4744, which, it was held, was not violated by receipt and possession of marijuana outside the United States. Accordingly, it was reasoned, declaration of the marijuana at the border would have resulted in its seizure prior to entry into the country and thus would have precluded liability under Section 4744 which applied solely to violation within the United States. The second reason advanced by these cases for rejecting a Fifth Amendment attack on Section 176(a) was that the self-incrimination privilege extended only to crimes already committed and not those contemplated or in process of commission. Therefore, it was concluded, since no violation of law occurred prior to entry into the country, the privilege against self-incrimination was not available although certain and imminent violation of the law was manifest.

Neither of the above rationales, it is submitted, retains present validity in light of this Court's decisions cited previously. Under Leary it is clear that a real and appreciable risk of liability may exist with respect to violation of state as well as federal law (26 U.S.C. 4744 is thus not alone to be considered in this

connection), and under Marchetti the Fifth Amendment privilege is made applicable to prospective acts as well as prior acts where the risks of incrimination (as to either) are substantial. Thus, this Court determined in Marchetti, as aptly summarized by the District Court in United States v. Reyes, 280 F. Supp. 267 (S.D.N.Y. 1968), at page 272:

> " . . . those inherently subject of criminal activities need not choose between ceasing their illegal activities or providing information incriminating to themselves."

Notwithstanding the foregoing, the Courts of Appeals have continued to reject a Fifth Amendment Self-Incrimination defense to prosecution under 21 U.S.C. 176(a). Lacking a predicate in the reasoning of the earlier decisions, now no longer viable, the more recent decisions have essentially ignored responding to the issue raised and have instead contented themselves, as was done in the opinion of the Court of Appeals herein, with a citation of immediately preceding decisions, all based upon one authority, Witt v. United States, 413 F.2d 303 (9th Cir. 1969). The soundness of Witt thus becomes the cornerstone of all subsequent cases founded on it, including the instant case, none of which has amplified on its reasoning; and conversely, a deficiency in the Witt reasoning must undermine each of these decisions, and in particular the instant matter.

D

The Witt Decision

Witt, it is submitted, is a summary, improperly reasoned rejection of Leary and the other cited decisions of this Court on the issue at bar. The essential deficiency of Witt is its failure to recognize that marijuana importation is not per se an illegal act. Illegality occurs only on the importer's failure to declare and invoice and pay tax on the merchandise. Accordingly, the act of importation is basically different from the type of conduct referred to in Witt as purportedly analogous in character: bank robbery and house burglary. In robbery and burglary, the perpetrator is involved in criminal activity at the moment of confrontation and if probable cause for his arrest is had his apprehension and search is lawfully mandated. No issue of self-incrimination is presented in such instance.

Such, however, is not the case with marijuana importation. There is no crime being perpetrated at the time of confrontation with custom's officials and no right of arrest or incidental search thus accrues. Should the importer, though, reveal his possession and intended importation of the marijuana, then he would substantially incriminate himself under state laws proscribing such possession. It is precisely such incrimination that the Marchetti, Grosso, Haynes, and Leary decisions say may not be compelled under the Fifth Amendment to the Constitution.

The basic proposition advanced in this regard is not that the above cases authorize or validate smuggling activity, as Witt erroneously suggests counsel's position to be, but rather that the omission which renders the importation of marijuana contrary to law and thus violative of 21 U.S.C. 176(a) (non-registration and tax payment) can be satisfied only by declaration and action which are manifestly self-incriminatory. The thrust of this Court's precedent decisions is clear that where such self-incriminatory aspects present themselves in compliance with the law, then non-compliance cannot be prosecuted without a corresponding Fifth Amendment conflict.

In effect, the equation of the present situation with fleeing bank robbers and house burglars loses sight of the essential premise involved as discussed above and substitutes emotional reaction for analogous legal reasoning. The instant matter and that discussed in Witt would conform to the robbery-burglary analysis of Witt were the offense involved a violation of 21 U.S.C. 173, narcotic importation, which is itself, without more, an illegal act. The analysis, however, cannot be equally made to the charge in fact involved here, a violation of 21 U.S.C. 176(a). The failure to recognize this distinction constitutes a critical defect in Witt, and one not remedied by any subsequent decision relying on Witt. Accordingly, Witt should not be deemed controlling on the case at bar.

E

Case At Bar

The discussion thus far has treated the question of the marijuana importer's liability under 21 U.S.C. 176(a) and the availability to him of a defense under the Fifth Amendment privilege against self-incrimination to prosecution for violation of that statute. The facts of the case at bar reflect petitioner to be the importer of the marijuana subject of this case and thus within the purview of the above discussion. However, petitioner was not charged with the offense of unlawful marijuana importation in the indictment returned against him but rather was charged with the offense, also a violation of Section 176(a), of receiving, concealing and transporting the subject marijuana. This thus presents a second question in the instant proceedings: whether the Government, assuming it may not punish importation under Section 176(a) for the reasons advanced earlier, may yet accomplish the same result by indirection through prosecution of the importer for his subsequent transportation of his importer merchandise. Phrased in terms of the present case, the inquiry is whether the Government, constitutionally prohibited from prosecuting petitioner directly as the unlawful importer of marijuana, can validly prosecute him, under the same code section but a different part thereof, for his subsequent possession, concealment and transportation of the property which follows immediately from the importation

or whether the two facets are indivisible parts of one single transaction requiring one standard of constitutional law application.

Petitioner submits the latter proposition to be the only sound and tenable one. A constitutional right cannot be regarded as so ephemeral in quality and character that it dissipates when confronted by a change in the form of accusation. The substance of the matter, not the form of the charge, must determine the application of a constitutional right, in this and in all instances. A person's conduct must be viewed in its entirety, and the act of importation is not ended by the introduction of merchandise into the country but continues at least until the importer completes the transportation of it to its initial destination.

F

Precedent Authority

Petitioner's position in this regard is supported by the reasoning and holding of this Court in Haynes v. United States, supra, and by the reasoning of the District Court in United States v. Reyes, supra. Although the decision in Reyes, on its facts, did uphold a prosecution under the concealment and transportation provisions of Section 176(a), the essential factual distinction between that matter and the instant case would require a contrary conclusion to be

reached herein. Reyes was predicated on the Haynes decision, which should thus be reviewed first to place both matters in proper perspective with respect to the present case.

In Haynes, the question presented was whether 26 U.S.C. 5851 violated the Fifth Amendment protection against self-incrimination. This statute made it a crime to possess a firearm which had not been registered as required by 26 U.S.C. 5841. This latter section required every person possessing a firearm (of certain description) to register the weapon. The type of firearm involved could not be lawfully possessed and so manifestly the registration section (5841) was constitutionally defective under the Fifth Amendment. The Government contended, however, that the possession section (5851) was not similarly defective because it imposed no self-incriminatory requirement such as registration but merely sought to proscribe one person's possession of a firearm unregistered by a previous possessor.

This Court acknowledged that if the Government's interpretation of Section 5851 were sound, then no self-incrimination considerations would be involved. Under such construction, the violation of Section 5851 would be complete immediately on the acquisition of possession by the defendant and nothing could or would be required of him that would be self-incriminatory. However, this Court further declared that if Section 5851 were construed to render the possession of a firearm which the possessor himself (as opposed to a previous possessor)

had failed to register to be in violation of the law, then the law was essentially the same as the registration law (Section 5841) and imposed similar unconstitutional self-incrimination requirements. The conclusion of the Court in Haynes was that the latter construction was the correct one and the section was therefore invalid.

In applying the rationale of Haynes to the analogous facets of 21 U.S.C. 176(a), the District Court in Reyes concluded that "an indictment for the possession of unregistered and untaxed marihuana" could not be invalidated on Fifth Amendment grounds "against one who was not required to incriminate himself". Such a conclusion, of course, obtains only in a situation, as presented factually in Reyes, where the possessor is not also the importer, who is required to register and pay tax on the marijuana and thus incriminate himself. Conversely, however, in circumstances such as are presented by the instant case, where the possessor of the unregistered and untaxed marijuana is also the importer, then a contrary result must follow under the very reasoning of Reyes, and an indictment for possession of unregistered and untaxed marijuana must fail under the Fifth Amendment. The situation then is parallel to that developed in Haynes, which is controlling under the circumstances. In effect, the possessor, whether of an unregistered gun or unregistered and untaxed marijuana, should not be held liable for a criminal violation which only his previous act of self-incrimination (registration and/or tax payment) could have avoided. Such a consequence was ruled violative of the Fifth

Amendment in Haynes and would be equally so in the present matter. In essence, Haynes affirms the Constitution's protection against indirect as well as direct encroachment on the rights accorded, a position which inures to petitioner's benefit and supports his contentions on the issues raised herein.

G

Conclusion

Petitioner in the present case was apprehended importing marijuana into the United States contrary to law. Compliance with the law would have exposed him to real and appreciable self-incrimination risks. Such exposure cannot be compelled consonant with the Constitution. Such is so whether prosecution for non-compliance proceeds directly or indirectly: the location of petitioner's apprehension, whether upon first arrival in the country (at the border) or some distance away (enroute to initial destination) is of no consequence. He may not, under the applicable authorities, be prosecuted and punished essentially for a failure to do that which the Constitution, as a matter of right under the Fifth Amendment, permits him to refrain from doing. The instant case, predicated on such a prosecution, cannot, therefore, be allowed to stand.

APPLICATION

It is respectfully requested, on the basis of the arguments presented and the authorities cited hereinabove, that the within petition for writ of certiorari be granted and the matter set for hearing on this Honorable Court's docket.

Respectfully submitted,

HOWARD E. BECKLER

Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
v.
TRAVIS GRANT ASHBROOK,
Appellant.
No. 25,384

[October 14, 1970]

Appeal from the United States District Court
for the Central District of California

Before: BARNES, DUNIWAY and TRASK.

PER CURIAM:

The case was tried upon a stipulation which established the basic facts. Appellant shipped from West Pakistan to Los Angeles International Airport, naming himself as consignee, two surfboards containing approximately 40 pounds of hashish. He claimed them at the airport and transported them by car and truck to a point in Riverside County, California, where he and two original co-defendants were arrested.

Appellant's argument on appeal is based upon *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Haynes v. United States*, 390 U.S. 85 (1968); and upon *Leary v. United States*, 395 U.S. 6 (1969). He contends that he could not be convicted as an importer under the rationale of those cases because as an importer he would have been required to disclose incriminating evidence. Because the government may not do indirectly what it cannot do directly, he continues, it may not convict him of receiving, concealing and facilitating the transportation of contraband. He frankly concedes that his argument was rejected in *Witt v. United States*, 413 F.2d 303 (9th Cir.), *cert. denied*, 396 U.S. 932 (1969). He asks us to reconsider our

decision. We are unwilling to do so. We believe *Witt* was properly decided. It has been followed numerous times by this court. *United States v. Vansant*, 423 F.2d 620, 621 (9th Cir. 1970); *Corwin v. United States*, 423 F.2d 33, 34 (9th Cir.), *cert. denied*, 398 U.S. 938 (1970); *United States v. de Polanco*, 422 F.2d 1304, 1305 (9th Cir.), *cert. denied*, 397 U.S. 1081 (1970) and *United States v. Cordova*, 421 F.2d 471, 475 (9th Cir.), *cert. denied*, 398 U.S. 941 (1970).

The judgment is affirmed.

ARCATA GRAPHICS, SAN FRANCISCO 10-19-70—140

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 25384
TRAVIS GRANT ASHBROOK, Appellant.	)	ORDER

Before: BARNES, DUNIWAY and TRASK, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

Filed Nov 5, 1970
Wm. B. Luck, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1055

TRAVIS GRANT ASHBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Central District of California, petitioner was convicted of unlawful importation of marihuana in violation of 21 U.S.C. 176(a). The court of appeals affirmed *per curiam* (Pet. App. A).

The stipulated facts showed that petitioner shipped a number of items from Karachi, West Pakistan to Los Angeles International Airport, naming himself as the consignee; included among the items were two surfboards containing 43 lbs. of marihuana. On the day the shipment arrived a search by customs agents revealed the presence of the marihuana. The following day petitioner called for the goods and, with the aid

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of two other co-defendants, transported the surfboards by car and truck to a point in Riverside County, California where he and his companions were arrested by customs agents.

Petitioner's sole contention is that the requirement in 21 U.S.C. 176(a), that marihuana be presented to customs officers for inspection prior to its entry into the United States, violates his Fifth Amendment privilege against self-incrimination. This contention has been consistently rejected. See, in addition to the cases cited in the opinion below (Pet. App. A 1–2), *Walden* v. *United States*, 417 F. 2d 698 (C.A. 5). As these decisions indicate, had petitioner complied with the statute and declared the marijuana at the border, it would have been confiscated before entering the United States and thus petitioner would not have been exposed to a real and appreciable hazard of self-incrimination under state law.

It is therefore respectfully submited that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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